Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-86

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONER

v.

MARGUERITE COOPER KING, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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59 pp

QUESTIONS PRESENTED

1. Whether Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), waives the government's sovereign immunity to permit the calculation of an attorney's fee award against the United States on the basis of an attorney's current rates (rather than the "historic" rates charged at the time that the work at issue was performed) to compensate the attorney for delay in the receipt of payment.

2. Whether an attorney's fee awarded under Section 706(k) should be enhanced for the superior quality of the representation when the lodestar was calculated on the basis of the attorney's actual rates.

3. Whether an attorney's fee awarded under Section 706(k) should be enhanced because there was some risk that the case might have been lost, and that the attorney therefore would not have received a fee.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, named respondents are Alison Palmer, A. Ellen Shippy, Mary Lee Garrison, Mary C. Finrow, Laurel M. Cooper, Mary Hartman, Mary A. Ryan and JulieAnn McGrath. These respondents represent a certified class composed of women who unsuccessfully applied between 1976 and 1983 to become Foreign Service Officers through the Department of State's Junior Officer Program, who were not subsequently hired as Foreign Service Officers, and who did not also apply to become Foreign Service Officers through mid-level, lateral entry, or reappointment programs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of State, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a), and the memorandum and order of the district court (App., *infra*, 3a-17a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1986. On June 16, 1986, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a rea-

sonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

1. In 1976, respondents brought these consolidated actions against the Department of State under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that the Department had discriminated on the basis of sex in the hiring and treatment of Foreign Service Officers. The merits of the actions were settled in part in October 1983, when the United States District Court for the District of Columbia approved a consent decree providing relief for female junior-level Foreign Service applicants. App., *infra,* 26a-27a.

Respondents then sought attorneys' fees under the Title VII fees provision, 42 U.S.C. 2000e-5(k), which states that "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs, and * * * the United States shall be liable for costs the same as a private person." In making this request, respondents maintained that the fee should be calculated on the basis of their attorneys' current, rather than their "historic," rates (see App., *infra,* 34a).[1] The government opposed this method of fee calculation, maintaining that the use of current rates was equivalent to an award of interest against the United States, which is improper in the absence of a waiver of sovereign immunity (*ibid.*).[2]

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[1] That is, the attorneys would be compensated for each hour billed during the course of the litigation at current rates, rather than at the rate actually charged by the attorneys at the time that the given hour of work was performed (see App., *infra,* 34a).

[2] The government also challenged the "prevailing market rate" proposed by respondents and certain claims for expenses (see App., *infra,* 28a), issues that are not in controversy here.

On September 17, 1984, the district court rejected the government's contention. Relying on *Murray* v. *Weinberger*, 741 F.2d 1423 (D.C. Cir. 1984), the court held that Section 2000e-5(k) "is a statutory waiver of sovereign immunity" (App., *infra*, 35a) in "the current rates context" (*id.* at 35a n.5). The court reasoned that private defendants may be required to compensate the attorneys for prevailing Title VII plaintiffs at current rates, and noted that the statute generally measures the government's liability against that of private defendants. The district court therefore concluded that a fee applicant "may calculate the lodestar according to current rates, or she may rely upon historical rates and seek an adjustment for 'delay in payment' " (*ibid.*). Here, the court based its fee award for respondents' attorneys on 1984 rates (*id.* at 34a-35a). In doing so, however, the court looked not to the attorneys' actual rates, but rather to a higher, hypothetical "prevailing community rate[]" (*id.* at 28a-36a).

After calculating the lodestar, the district court found that the addition of a "contingency adjustment" would be appropriate to compensate respondents' attorneys for the "uncertainty of ever receiving compensation" (App., *infra*, 43a). The court noted the "legal and factual complexity and uncertainty [that] existed at the commencement of this suit," accepting respondents' submission that the "odds of success" at the outset were 75%. Given these considerations, the court concluded "that the merits lodestar should be adjusted upward by 20% to fairly compensate [respondents'] counsel." *Ibid.* The court accordingly awarded respondents' attorneys a total of $439,541.48 in fees and costs (*id.* at 25a, 45a).

2. On October 15, 1984, the government moved the district court for reconsideration of the fee award, arguing that, under the intervening decision in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), cert.

denied, No. 84-1655 (June 17, 1985), the use of prevailing community rates in calculation of the lodestar was inappropriate. In response to this motion, the district court essentially broke the fee award into three parts. The first part included the largely undisputed portion of the fee award (based on the actual historic rates of respondents' attorneys); on November 7, 1984, the court issued an interim award ordering the government to pay this portion of the fee—$219,439.40—within 14 days. App., *infra,* 22a-23a. The second portion of the award involved "the difference between the uncontested amount (based on the historical hourly rates of [respondents'] counsel when the work was performed) and the amount of fees as calculated based on the use of hourly rates in effect when the Fee Application was filed" (*id.* at 21a); in a separate order, the court also directed the government to pay this amount—$38,222.81—within two weeks. Finally, the district court reserved judgment on the third portion of the award, which represented the difference between a fee based on actual rates and a fee based on hypothetical community rates.

On the government's appeal of the interim fee awards, the court of appeals summarily affirmed the second interim order, which mandated payment of the undisputed portion of the fees at current rates (App., *infra,* 1a-2a).[3] The court of appeals explained only that "the correctness of the district court judgments" is "demonstrate[d]" by the District of Columbia Circuit's decision in *Shaw* v. *Library of Congress,* 747 F.2d 1469 (1984), rev'd, No. 85-54 (July 1, 1986), which held that Section 2000e-5(k) waived the sovereign immunity of the United States as to awards of interest (App., *infra,* 19a). The government then

[3] The court of appeals also affirmed the district court's first interim order directing immediate payment of the uncontested portion of the fees (App., *infra,* 19a). That portion of the fees has now been paid.

filed a petition for a writ of certiorari (No. 85-50) challenging this judgment; on July 7, 1986, this Court vacated the judgment of the court of appeals and remanded the case for reconsideration in light of the Court's decision in *Shaw*.

3. While the challenge to the second interim fee award was proceeding in the court of appeals and in this Court, the district court turned to the government's pending motion for reconsideration relating to the use of hypothetical community rates. On December 21, 1984, the district court granted the government's motion. The court explained that, under *Laffey* v. *Northwest Airlines, supra,* fees generally should be based on an attorney's actual billing rates, rather than on a hypothetical prevailing rate. The district court accordingly recalculated the lodestar on the basis of the actual rates charged by respondents' attorneys: $80 per hour for partners and $65 per hour for associates (which substituted for the court's original fee schedule of $75 per hour for the most junior associates and $150 per hour for the most senior partner (App., *infra,* 15a, 29a)). *Id.* at 11a. In making this calculation, however, the district court again used actual *current* rates, rather than the rates in effect at the time that the work at issue was performed.

While this adjustment resulted in a substantial reduction in the size of the lodestar, the district court proceeded to readjust the new lodestar upward by 54.75%—representing $99,546.53—"[i]n view of [respondents' attorneys'] superior services and exceptional success" (App., *infra,* 12a). In doing so, the court explained that the services provided by the attorneys "were far superior to what could reasonably be expected of attorneys charging a maximum of $65 per hour for associates and $80 per hour for partners" (*ibid.*) The court also reaffirmed its September 17, 1984, conclusion (see *id.* at 36a-44a) that the attorneys were entitled to a 20% "contingency adjustment" amounting to

$36,364.03 (*id.* at 14a). The court accordingly ordered the government to pay respondents' attorneys an additional $147,807.25 (*id.* at 15a).

On the government's appeal, the court of appeals again affirmed by order. The court "question[ed] whether the 'enhancements' made for quality and contingency fit the case law as it is evolving," but explained that its "doubts on that score are offset by appreciation that, in this particular case, * * * [the attorneys'] own rate[s] may have fallen below the rate brackets indicated by the charges of other firms for similar work in this community." The court of appeals accordingly found "no abuse of discretion in the fees and expenses awarded in the order on review." App., *infra*, 2a.[4]

REASONS FOR GRANTING THE PETITION

1. The district court's use of the rates *currently* charged by respondents' attorneys in its calculation of the fee award here cannot be reconciled with this Court's recent decision in *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986). In *Shaw*, the Court reaffirmed the traditional rule that the United States is immune from liability for interest "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit" (slip op. 4). The Court added that this traditional "no-interest rule" should be applied "to prevent

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[4] While recognizing that the use of current rates in the calculation of a fee award was proper under District of Columbia Circuit precedent, the government did not "waive any argument concerning the District Court's utilization of [respondents'] counsel's *current* billing rates, as opposed to the rates in effect when the work was actually performed, a situation raising the issue of the payment of interest which is currently involved in the Government's pending petitions for writs of certiorari in *Shultz* v. *Palmer*, No. 85-50 (July 11, 1985), and *Library of Congress* v. *Shaw*, No. 85-54 (July 12, 1986)." Gov't C.A. Reply Br. 10 n.5 (emphasis in original); see Gov't C.A. Br. 5 n.1.

parties from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay" (*id.* at 11). And the Court rejected the contention—relied upon by the courts below (see App., *infra*, 35a n.5)—that 42 U.S.C. 2000e-5(k) effected a waiver of this governmental immunity (slip op. 7-11). Because the courts below viewed the use of current rates as the equivalent of "an adjustment for 'delay in payment' " (App., *infra*, 35a n.5), the judgment of the court of appeals should be vacated, and the case remanded to give those courts an opportunity to recalculate the fee award in accordance with the standards set out in *Shaw*.[5]

2. We also note that the district court's enhancement of the fee award to reflect the superior quality of the representation provided by respondents' counsel appears inconsistent with this Court's decision in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, No. 85-5 (July 2, 1986). While acknowledging that enhancement of the lodestar might be appropriate in extraordinary cases, the Court in *Delaware Valley* emphasized that "the 'quality of representation[]' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award" (slip op. 17 (quoting *Blum* v. *Stenson*, 465 U.S. 886, 898-900 (1984)). For this reason, the Court explained that "the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of 'double counting' " (slip op. 19).

These observations seem fully applicable here. Because the rate used in calculating the lodestar in this case is the one actually charged by respondents' attorneys in litiga-

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[5] As noted above (at 4-5), that is the course followed by the Court in an earlier stage of this litigation involving the award of attorneys' fees at current rates. See *Shultz* v. *Palmer*, No. 85-50 (July 7, 1986) (memorandum).

tion involving paying clients, it is hardly obvious "why the lodestar amount was unreasonable" (*Delaware Valley*, slip op. 20). And the compensation of respondents' attorneys at their normal billing rates—the rates at which those attorneys make themselves available to the public—plainly satisfies the purpose of Section 2000e-5(k) by making "it possible [for a Title VII plaintiff] to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee' " (slip op. 18). It therefore would be appropriate to direct the court of appeals to reconsider the use of a quality-of-representation multiplier in light of the guidance provided by *Delaware Valley*.

3. Finally, the remaining element of the lodestar enhancement here—the 20% contingency multiplier—involves an issue that currently is before the Court. The Court has set a portion of *Delaware Valley* for reargument next year to address the question whether attorneys' fees awarded under fee-shifting statutes "may be enhanced based on the risk of loss, and if so, to what extent" (*Delaware Valley*, slip op. 21). The Court therefore might wish to hold this case pending final disposition of *Delaware Valley*. In our view, however, judicial economy would best be served by remanding this case to the court of appeals now; the court of appeals could itself withhold final judgment pending this Court's decision in *Delaware Valley*. In the interim, that court would have had an opportunity to assess the significance of *Shaw* and the already-decided portions of *Delaware Valley* for the outcome here.[6]

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[6] We note that withholding a final disposition here pending the outcome in *Delaware Valley* would not delay payment in an inequitable manner. Respondents' attorneys already have received $219,439.40 in fees pursuant to the district court's first interim order. The entitlement of the attorneys to any of the remaining fees is in dispute.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Shaw* v. *Library of Congress*, No. 85-54 (July 1, 1986), and *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air*, No. 85-5 (July 2, 1986).

Respectfully submitted.

CHARLES FRIED
Solicitor General

JULY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5153

MARGUERITE COOPER KING, ET AL.

v.

GEORGE P. SHULTZ, AS SECRETARY OF STATE, APPELLANT

AND CONSOLIDATED CASE NOS. 85-5154,
85-5198 and 85-5199

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed Mar. 24, 1986]

Before: GINSBURG, SCALIA, and BUCKLEY, Circuit Judges.

JUDGMENT

These cross-appeals were reviewed on the record from the United States District Court for the District of Columbia and were briefed and argued by counsel for the parties. The panel has considered the issues presented and finds they occasion no need for an opinion by this court. *See* D.C. Cir. R. 13(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment from which the appeal and cross-appeal have been taken is affirmed. It is

FURTHER ORDERED, by this Court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for

rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

MEMORANDUM

The district court confronted plaintiffs' fee and expense application at at time when the law of this circuit was in flux. We are satisfied that the district judge, in his December 21, 1984, memorandum, conscientiously endeavored to apply the law as declared in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984). We question whether the "enhancements" made for quality and contingency fit the case law as it is evolving, but our doubts on that score are offset by appreciation that, in this particular case, the firm's own rate may have fallen below the rate brackets indicated by the charges of other firms for similar work in this community. *See Laffey*, 746 F.2d at 24-25. In view of the large respect we owe to district court assessments in these matters, and the reasonable result achieved, we can find no abuse of discretion in the fees and expenses awarded in the order on review.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Jan. 23, 1985]

MEMORANDUM AND ORDER

This matter is presently before the Court on plaintiffs' motion for reconsideration of this Court's December 21, 1984 Memorandum Opinion (Mem. Op.) granting, pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), plaintiffs fees and costs in the amount of $405,469.46. In their motion plaintiffs request that the upward adjustment for quality of representation used in calculating the merits lodestar be similarly applied to

the fee litigation lodestar. Upon careful review of the record, plaintiffs' motion is denied.

In applying the upward adjustment to the merits lodestar, the Court was guided by the Supreme Court's statement in *Blum v. Stenson*, 104 S.Ct. 1541, 1549 (1984), that quality of representation "may justify an upward adjustment only in the rare case when the fee applicant offers specific evidence to show the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and the success was 'exceptional'." The Court found that this was one of those "rare cases" referred to in *Blum*, and that plaintiffs had rendered "superior services" and achieved "exceptional success." Mem. Op. at 6-7. These findings did not encompass plaintiffs' achievement of an award of attorney' fees.

The plain language used in *Blum* suggests that the criteria of "superior service" and "exceptional success" relate to an upward adjustment solely to the merits portion of the litigation. Such an interpretation of *Blum* itself would be enough to preclude any adjustment to the fee litigation lodestar. In addition, to the extent the above criteria can be applied to the fee litigation lodestar, an upward adjustment is denied because the success obtained in winning an award of attorney's fees is far from exceptional.

The Court concludes that an upward adjustment for quality of representation was not meant to apply to the fee litigation. Accordingly, it is by the Court this 23rd day of January, 1985

ORDERED that plaintiffs' motion for reconsideration is denied.

/s/ John Lewis Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Jan. 23, 1985]

ORDER

Upon consideration of defendant's motion requesting that the Court's December 21, 1984 memorandum and order be entered as a final judgment, plaintiffs' lack of opposition thereto, and it appearing that there is no just reason for delay in entering such a final judgment, it is by the Court this 23rd day of January 1985,

ORDERED that defendant's motion is hereby granted, and it is

FURTHER ORDERED that this Court's December 21, 1984 memorandum and order is hereby designated a final judgment, pursuant to Federal Rule of Civil Procedure 54 (b), on the issue of plaintiffs' application for an award of attorneys' fees and expenses.

/s/ John Lewis Smith, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Dec. 21, 1984]

MEMORANDUM

This matter is presently before the Court on defendant's motion for reconsideration of this Court's September 17, 1984 Memorandum Opinion granting, pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), plaintiffs fees and costs in the amount of $439,541.48. The government moves for reconsideration in light of the Court of Appeals decision in *Laffey* v. *Northwest Airlines*,

Inc., No. 83-1838 (D.C. Cir. Sept. 28, 1984), which delineates the standards to be used in calculating attorney's fees awards to "for-profit" firms. Upon careful review of the record, and of recent developments in the law, the defendant's motion for reconsideration is granted and plaintiffs are awarded $147,807.25.

In the September 17 Memorandum Opinion (Mem. Op.), this Court properly determined that "[t]he initial task in determining an appropriate fee award . . . is to establish the 'lodestar': the number of hours expended multiplied by a reasonable hourly rate." Mem. Op. p. 3, quoting *National Association of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1323 (D.C. Cir. 1982) (citing *Copeland* v. *Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (*en banc*) ("*Copeland III*")). As there was no dispute as to the "number of hours expended" by plaintiffs, Mem. Op. pp. 3-4, the Court was left to calculate a "reasonable hourly rate." This Court examined the actual rates charged by plaintiffs but concluded that the 'market value" of counsels' services was more accurately reflected in "prevailing community rates." The Court found that plaintiffs' proposed rate schedule ' was consistent with 'prevailing community rates' and appropriate for use in calculating the lodestar." Mem. Op. p. 9. The Court rejected the government's argument that the use of current rates represented a claim for interest barred by sovereign immunity, instead finding that section 706(k) is a statutory waiver of sovereign immunity. Mem. Op. p. 10. In addition, the Court, finding that the facts of this particular application met the criteria established by *Blum* v. *Stenson*, 104 S.Ct. 1541 (1984), and *Murray* v. *Weinberger*, No. 83-1680 (D.C. Cir. August 24,

1984), ordered that the merits lodestar be adjusted upward by 20% to reflect the uncertainty that existed at the commencement of the suit, the so-called contingency multiplier. All told, this Court awarded plaintiffs $439,541.48, which included a fee litigation lodestar of $63,901.25, a final merits award of $337,669.20, and $37,971.03 as reimbursement for reasonable litigation expenses.

The relevant portions of the *Laffey* decision concern the hourly rate component of the lodestar calculation. The Court of Appeals drew a distinction between nonprofit and for-profit firms, holding that a private firm's customary hourly rate, not the rates charged by other attorneys in the community, should be used in calculating a lodestar fee for a prevailing party under a fee-shifting statute. *Laffey*, slip op. at 54. The Circuit Court was concerned with avoiding "a second major litigation" that often accompanies a court's "essentially impossible task of selecting one rate over another from a wide range of 'market' rates." *Id.* at 28. The Court of Appeals recognized that while the "prevailing market rate" may be "a necessary evil" when a nonprofit firm is involved, it can be dispensed with where a private, for-profit law firm has established market rates for similar services.

Before dealing with the merits, the Court must first address plaintiffs' procedural objection to the motion. Plaintiffs assert that *Laffey* is merely a reaffirmation of current case law, not a change in law, and that defendant has waived any opportunity to argue that Terris and Sunderland's normal billing rate is the appropriate market rate by the failure to assert this position in earlier proceedings. This contention is without merit. The Court of Appeals decision in *Laffey* constitutes a significant change in the

law and this Court must now decide how this change is applicable to the instant case.

The first issue before the Court is whether Terris and Sunderland's normal billing rate constitutes an established market rate as defined by *Laffey* that should be used in computing the lodestar fee. Defendant contends that plaintiffs are no different than the quasi-public interest law firm involved in *Laffey* and should be subject to payment according to its "long standing history of market rates charged to clients." Def. Mem., p.5. Defendant presents Terris and Sunderland as being no different than any ordinary private law firm.

Plaintiffs oppose this characterization, contending both that Terris and Sunderland is not a law firm with a "customary private practice" and that it has no firmly established billing rate. Plaintiffs point to the distinctions that exist between Bredhoff & Kaiser, the firm seeking fees in *Laffey*, and Terris and Sunderland to illustrate that it has a different practice. The two most noteworthy distinctions include the fact tha Terris and Sunderland has no "partnership trac k" where lawyers can expect to eventually become par ners and the firm bills at a flat rate, with no consid ration made for an attorney's experience or qualifica ions. Plaintiffs fu ther argue that they have no esta blished billing rate; instead their rates are set "at leve s that will allow it to provide representation to ind viduals and groups who could not afford counsel at full market rates." Pl.Mem., p.10. Plaintiffs, thus, contend that Terris and Sunderland is a public interest law firm with no established billing rate, and not subject to the holding of *Laffey*.

The Court disagrees with plaintiffs' contention. Sufficient evidence is available to conclude that Terris and Sunderland has an established billing rate, pres-

ently set at $80 per hour for partners and $65 per hour for associates. Terris Dep. at 14. It is clear that the $80/65 rate is charged to all clients unless two conditions exist: the client cannot pay and attorney fees can be obtained under an applicable statute. Terris Dep. at 13. Plaintiffs only infrequently encounter a situation where their normal fees are reduced. Terris Dep. at 10-11. At all other times, plaintiffs charged their clients their normal rates.

Plaintiffs argue that this rate does not qualify as an "established billing rate" because it fails to reflect the market value of the firm's legal services but instead reflects a choice "to cater[] to people who have very limited sums of money." Terris Dep. at 29. The Court of Appeals in *Laffey* discounted a similar argument, stating that "the fact that [the applicant's] clients cannot afford unlimited legal fees fails to distinguish them." *Laffey*, slip op. at 19 n.69. Plaintiffs have chosen "to cater" to a particular segment of the market by using lower rates, thereby avoiding competition from the "premium" firms whose high rates could not be paid by plaintiffs' clients. The Court finds that plaintiffs do indeed have an established billing rate, $80 per hour for partners and $65 per hour for associates, which results in a merits lodestar of $181,820.15 and a fee litigation lodestar of $40,400.00.

Though adopting a rate less than that included in the original award, the Court is convinced that this case is one of the "rare cases" referred to in *Blum*, 104 S.Ct. at 1549, where an upward adjustment based on quality of representation is entirely appropriate. Though *Blum* indicated that "the quality of representation . . . generally is reflected in the reasonable hourly rate," the Supreme Court pointed out that quality of representation "may justify an upward

adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional'." *Id.*

In the September 17 Memorandum this Court specifically noted that plaintiffs' work product "[had] been superior throughout," Mem. Op. p.8, and made an award at hourly rates "equal to or below prevailing market rates in the District of Columbia for lawyers of similar skill and experience." Mem. Op. p.9. Explicit in the calculation of the award at prevailing market rates was that plaintiffs' services were equal in quality to those of attorneys charging that rate, thus clearly indicating that plaintiffs' services were far superior to what could be reasonably expected of attorneys charging a maximum of $65 per hour for associates and $80 per hour for partners. This Court has already described the relief achieved as "exceptional" within the meaning of *Blum*, albeit in a different context. Mem. Op. pp.13, 16-17. The relief achieved through entry of the Consent Decree was indeed exceptional substantially eliminating seven previous years of hiring disparities, and carrying a conservatively estimated monetary value of $8.6 million. Pl. App. 4-6. In view of plaintiffs' superior services and exceptional success, the Court believes that the merits lodestar should be adjusted upwards by 54.75%, producing an enhancement of $99,546.53.

Defendant also questions this Court's use of a contingency multiplier in the original award where the odds of success were estimated to be 75%, pointing to the *Laffey* court's rejection of a multiplier where it was held that there was a 50% chance of success. Defendant misreads the September 17 Memorandum

and *Laffey* in reaching this conclusion. While the Court of Appeals did state that "[a]ny crude multiplier derived simply from the plaintiff's chance of success must be rejected as contrary to the congressional scheme," *Laffey*, slip op. at 48, the Court stopped short of declaring the impropriety of a contingency "enhancement" in every case. *Id.* at 48-49. The Court in *Laffey* did hold that an insufficient showing had been made by plaintiffs' counsel to qualify as an exceptional case pursuant to *Blum*. *Id.* at 49.

This Court in its September 17 Memorandum went beyond merely examining the chance of success in awarding a contingency adjustment to plaintiffs. This Court found, pursuant to *Blum* and *Murray*, that this was an exceptional case worthy of a contingency adjustment. The specific circumstances justifying the enhancement enumerated in the September 17 Memorandum bear repeating here.

> Both legal and factual complexity and uncertainty existed at the commencement of this suit. For example, on the critical issue of employment test validation, there was no legally preferred method of validation, and plaintiffs had no knowledge of whether defendant in fact employed validation procedures. That remained to be uncovered through discovery. Furthermore, plaintiffs' counsel were obviously committing significant time and resources, particularly in view of the firm's small size. Class actions involve efforts beyond those associated with an ordinary lawsuit, and the massive statistical evidence required expert (and expensive) analysis. It appears to the Court that a contingency adjustment is "necessary to facilitate the filing" of cases of this type, where both the scope of the

> claims and the number of complainants are atypical.

Mem. Op. pp.16-17 (citations omitted). Unlike *Laffey*, plaintiffs' counsel did make sufficient showing to qualify as an exceptional case.

The reasoning used by this Court in the original award for granting the contingency adjustment is not changed by *Laffey*. While the September 17 Memorandum does make mention of the district court decision in *Laffey*, 572 F.Supp. 354 (D.D.C. 1983), the reasoning used there, based on *Blum* and *Murray*, would stand even were those references to *Laffey* excised from the opinion. Consequently, for the reasons cited by the Court here and in the September 17 Memorandum, the risk of nonpayment undertaken by counsel in this case is "exceptional" within the meaning of *Blum* and *Murray*, and a 20% enhancement, totaling $36,364.03, is awarded.

The Court finds it unnecessary to address the propriety of its award of $37,971.03 as reimbursement for reasonable litigation expenses. In addition, *Laffey* expressly approves the use of current rates against federal defendants to counterbalance the delay in payment as well as to simplify the task of the district court. *Laffey*, slip op. at 33 n.104. These portions of the original award remain intact.

Plaintiffs have submitted a supplemental application for an award of attorney's fees and expenses arising incident to litigating the motion for reconsideration. Included in this application is a request for fees for time expended litigating plaintiffs' original application for attorney's fees. Plaintiffs are not entitled to compensation for the 10.75 hours associated with litigating their original application. Any compensation for those hours should have been presented to the Court in time to have been considered

in the September 17 Memorandum. The Court's consideration of defendant's motion was not intended to provide plaintiffs with a second opportunity to obtain fees for hours not included in their original application.

The Court must next determine what portion of the remaining hours was reasonably expended litigating the applicability of *Laffey*. *Copeland III*, 641 F.2d at 891. Plaintiffs have provided sufficient documentation so that the Court can make an independent determination as to whether or not the hours claimed are justified. The Court finds that the hours submitted by plaintiffs, except those categorized as research and miscellaneous, should be reduced by one third. This leaves plaintiffs with 99.5 hours billable to associates and 9.75 to partners. As previously established, the proper hourly rate to be used in calculating the lodestar fee is $65 for associates and $80 for partners. With expenses, this Court finds reasonable a fee litigation lodestar of $9,367.72.

Accordingly, defendant's motion for reconsideration is granted and plaintiffs are entitled to a total payment of $405,469.46. This figure represents a total merits lodestar of $317,730.71 ($181,820.15 plus the 54.75% quality enhancement, $99,546.53, and the 20% contingency enhancement, $36,364.03), a fee litigation lodestar from the original application of $40,400.00, $37,971.03 for expenses, and $9,367.72 in fees for litigating the motion for reconsideration. As defendant has already been ordered to pay $257,662.21, plaintiffs are awarded an additional amount of $147,807.25.

An appropriate order follows.

/s/ John Lewis Smith, Jr.
United States District Judge

Dated: December 21, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Dec. 21, 1984]

ORDER

Upon consideration of defendant's motion for reconsideration of this Court's September 17, 1984 Order, plaintiffs' response, oral argument by counsel, and the entire record herein, it is by the Court this 21st day of December, 1984

ORDERED that defendant's motion is granted and that the award to plaintiffs of $439,541.48 is rescinded. It is further

ORDERED, for the reasons stated in the accompanying Memorandum, that in addition to the $257,662.21 awarded to plaintiffs by the two Orders of November 7, 1984, plaintiffs are entitled to attorney's fees and expenses in the amount of $147,807.25, said amount to be paid on or before January 22, 1985.

/s/ John Lewis Smith, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 76-01439

Civil Action No. 76-02006

No. 84-5815

ALISON PALMER, ET AL.

v.

GEORGE P. SHULTZ, as SECRETARY
OF STATE, APPELLANT

And Consolidated Case No. 84-5816

[Filed Feb. 11, 1985]

ORDER

Before: EDWARDS, GINSBURG and SCALIA, Circuit Judges

Upon consideration of appellees' motion for summary affirmance, the response, the correction to the response, and the reply, it is

ORDERED by the court that the motion for summary affirmance is granted in part, with regard to the judgments entered by the district court and appealed herein, and those judgments are affirmed. The merits of the appeals are so clear as to make summary affirmance proper. *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980); *see United States v. Glover*, 731 F.2d 41 (D.C. Cir. 1984). Concerning the specific points raised by appellant, the court notes that there is no mention in *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981) (per curiam), of appeal of any issue but the award of attorneys' fees, that the suggestion of rehearing *en banc* in *Shaw v. Library of Congress*, 747 F.2d 1469 (D.C. Cir. 1984) has been denied, and that the principle of judicial economy was not found to warrant delay of the attorneys' fees award summarily affirmed in *Parker*, 670 F.2d at 250. *Parker* and *Shaw* demonstrate the correctness of the district court judgments. The amount due and owing under these judgments shall be paid immediately. It is

FURTHER ORDERED by the court that the case is remanded in part, solely for the purpose of allowing the district court to rule on the award of post-judgment interest requested by the appellees. The parties have not adequately briefed this issue. *See Glover*, 731 F.2d at 45. It is

FURTHER ORDERED by the court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. D.C. Cir. R. 14.

Per Curiam

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Nov. 7, 1984]

ORDER CONCERNING AWARD OF FEES AT CURRENT RATES

Upon consideration of Plaintiffs' Motion for an Award of Uncontested Attorneys' Fees and Costs, Defendant's Opposition thereto, Plaintiffs' Reply, and the representations of counsel at oral argument, the Court hereby reaffirms its September 17, 1984, finding that the use of current hourly rates is appropriate in this case. It is therefore hereby

ORDERED that defendant pay plaintiffs a sum of $38,222.81 in attorneys' fees, which represents the difference between the uncontested amount (based on the historical hourly rates of plaintiffs' counsel when the work was performed) and the amount of fees as calculated based on the use of the hourly rates in effect when the Fee Application was filed. This sum is to be paid within 14 days of the date of this Order.

The Court hereby expressly determines pursuant to Rule 54(b) that there is no just reason for delay in the entry of a final judgment as to the issue of the use of current hourly rates and directs entry of final judgment as to that issue.

SO ORDERED this 7th day of November, 1984,

/s/ John Lewis Smith, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Nov. 7, 1984]

ORDER CONCERNING UNCONTESTED FEES

Upon consideration of Plaintiffs' Motion for an Award of Uncontested Attorneys' Fees and Costs, Defendant's Opposition thereto, Plaintiffs' Reply, and the representations of counsel at oral argument, the Court finds that the sum of $183,997.34 in attorneys' fees (based on historic rates charged by plaintiffs' counsel) and $35,442.06 in costs is uncontested. Pursuant to *Parker v. Lewis*, 670 F.2d 249, 250 (D.C.

Cir. 1982) (per curiam), the Court finds that there is no reason for further delay in the payment of fees conceded to be "properly due and owing." It is therefore hereby

ORDERED that defendant pay plaintiffs a sum of $219,439.40 in attorneys' fees and expenses within 14 days of the date of this Order.

The Court hereby expressly determines pursuant to Rule 54(b) that there is no just reason for delay in the entry of a final judgment as to the portion of attorneys' fees and expenses that have not been contested by the parties and directs the entry of final judgment as to that issue.

SO ORDERED this 7th day of November, 1984

/s/ John Lewis Smith, Jr.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Sept. 17, 1984]

ORDER

Upon consideration of plaintiffs' application for an award of attorney's fees and expenses pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), defendant's response, and the entire record, it is by the Court this 14th day of September, 1984

ORDERED, for the reasons given in the accompanying memorandum, that plaintiffs are entitled to an award of attorney's fees and expenses in the amount of $439,541.48. It is further

ORDERED that defendant shall pay plaintiffs the sum of $439,541.48 no later than October 14th, 1984.

/s/ John Lewis Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Sept. 17, 1984]

MEMORANDUM

This matter is before the Court on plaintiffs' application for an award of attorney's fees and expenses under § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), In applications filed December 12, 1983, and July 12, 1984, plaintiffs request a total of $450,797.12 in fees and expenses. The request arises from a class action against the Department of State, in which plaintiffs alleged widespread sex discrimination by defendant with respect

to employment practices in the Foreign Service. On October 12, 1983, some seven years after suit was filed, this Court approved a consent decree settling the portion of the case involving applicants for junior-level Foreign Service positions. That decree supplies the basis for plaintiffs' claim that they are the "prevailing party" and thereby entitled to an award under § 706(k).

This is an unusual case. Major pieces of Title VII litigation often produce major pieces of attorney's fees litigation. The substantive standards involve resolution of numerous factual issues, subsumed under this analytical heading or that, all litigable, and all subject to an imprecise test of "reasonableness." The procedural standards, most thoroughly set out by the Court of Appeals in *National Association of Concerned Veterans* v. *Sec'y of Defense*, 675 F.2d 1319 (D.C. Cir. 1982), require detailed documentation of the attorney's efforts, and establishment through affidavit of a "prevailing market rate" in a "market" that really does not exist. The result is often lengthy records, lengthy proceedings, and lengthy "opinions" where the Court not so much opines but rather acts as a blackrobed bookkeeper. It is not surprising that judges frequently decry the entire process.

This case is not like that. The issues are few in number, and legal in character. The government offers no opposition on several key questions. It concedes that plaintiffs are the prevailing party. It does not challenge in any respect the "reasonableness" of the hours claimed by plaintiffs. It provides but four pages of evidence of prevailing market rates. For their part, plaintiffs base their request for a multiplier on only one of the three grounds generally ac-

cepted as supporting an adjustment to the lodestar. The parties join issue on only three matters: the prevailing market rate, the use of current market rates in claims against the government, and plaintiffs' entitlement to compensation for certain expenses. Upon careful review of the record, and of recent developments in the law, the Court concludes that plaintiffs are entitled to an award of $439,541.48.

1. *The Lodestar: Appropriate Hourly Rate*

"The initial task in determining an appropriate fee award . . . is to establish the 'lodestar': the number of hours expended multiplied by a reasonable hourly rate." *Concerned Veterans, supra*, 675 F.2d at 1323 (citing *Copeland* v. *Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (*en banc*) ("*Copeland III*")). *See also Hensley* v. *Eckerhart*, 103 S.Ct. 1933, 1939 (1983). Defendant does not question the "number of hours expended" by plaintiffs' counsel, and with good reason: plaintiffs fully document and justify the hours claimed.[1] Defendant does challenge plaintiffs'

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[1] Plaintiffs claim a total of 2746.63 hours devoted to merits issues, and 642.25 hours to the fee litigation. The application carefully distinguishes between time devoted to the "employee" and to the "applicant" portions of the case, and offers a reasonable method for compensating efforts common to both claims. *See* Plts. Mem. at 13-19; First Terris Affidavit at ¶¶ 4-45; *cf. Hensley* v. *Eckerhart, supra*, 103 S.Ct. at 1940-41. Furthermore, counsel's "billing judgment," *id.* at 1940, as articulated and as applied, cannot be criticized. Counsel exercised it in a conscientious and fair manner throughout. *See* Plts. Resp. Interr. No. 15 (filed June 4, 1984); Terris Dep. at 51-57 (filed June 10, 1984); Attachment D to Dec. 12 App. (contemporaneous time records).

As noted, defendant does not "challenge the accuracy and reasonableness of the hours charged." *Blum* v. *Stenson*, 104

requested hourly rates, and to that issue the Court now turns.

Seventeen different attorneys from Terris & Sunderland worked on this matter over the past eight years. The proposed rate schedule, based on years of experience, ranges from a high of $150 per hour for Mr. Terris, to a low of $75 per hour for the most junior associates. *See* Plts.Mem. at 20. Because of the firm's policy of assigning primary responsibility at any given time to one or two associates, attorneys in the 4-7 and 8-10 year categories ($95-110) performed most of the work. *See id.*; First Terris Affidavit at ¶ 14.

Plaintiffs' proposed rate schedule is tested against this standard: "a reasonable hourly rate [is] that prevailing in the community for similar work." *Concerned Veterans, supra,* 675 F.2d at 1323 (citing *Copeland III, supra,* 641 F.2d at 1323). Defendant finds plaintiffs' proposal excessive. According to defendant, "similar work" means representation of plaintiffs in Title VII cases. "Prevailing rate" means the actual rate charged to plaintiffs by the applicant and by other Title VII attorneys. Defendant suggests that its own settlement policy, offering rates in a $45-75 range, more accurately reflects the true "prevailing community rate." *See* Def.Mem. at 2-3.

This approach is incorrect. The Supreme Court, the Court of Appeals, and this Court have rejected the various premises of defendant's argument, as well as its method of presentation. Needless to say, de-

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S.Ct. 1541, 1545 n.5 (1984). Nonetheless, the Court has reviewed the record and reached an "independent determination [that all] the hours claimed are justified." *Concerned Veterans, supra,* 675 F.2d at 1327. *See also Wojtkowski* v. *Cade,* 725 F.2d 127, 130 (1st Cir. 1984).

fendant's evidentiary offerings are of the sort expressly condemned in *Concerned Veterans*:

> "It should be recognized that fees awarded in other cases are probative of the appropriate community rate only if they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and issues of comparable complexity were raised
>
> . . .
>
> "A blunderbuss array of cases specifically selected to support a low hourly rate does not assist the District Court in determining the prevailing community rate. Carefully selected cases organized in a meaningful fashion, on the other hand, would be extremely useful." *Concerned Veterans, supra*, 675 F.2d at 1325 n.7.

Defendant's legal argument is also deficient. Defendant incorrectly limits the inquiry to the plaintiff's side of the "Title VII market." In 1983, this Court rejected the notion that there are "separate prevailing rates for the defense and prosecution of Title VII actions." *Laffey* v. *Northwest Airlines*, 572 F.Supp. 354, 374 (D.D.C. 1983). In 1984, the Supreme Court rejected the notion that subject-matter determines [*sic*] statutory fee awards are set according to the "same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . . ." *Blum* v. *Stenson, supra*, 104 S.Ct. at 1546 (quoting S. Rept. No. 94-1011 p.6, U.S. Code Cong. & Admin. News 1976 pp. 5908, 5913). The key aspect of a case is its complexity, not its cause, a proposition in accord with both the law and the views of practitioners (*see infra* note 3).

Defendant is correct in observing that the court must examine the actual rates charged by plaintiffs' counsel. *See Concerned Veterans, supra,* 675 F.2d at 1326 (actual rate "highly relevant proof of the prevailing community rate"). The cases, however, recognize that firms may charge rates that—"for whatever reason—do not reflect the full value of [their] services." *Laffey* v. *Northwest Airlines, supra,* 572 F.Supp. at 374. *See also Blum, supra,* 104 S.Ct. at 1547 & n.11; *Concerned Veterans, supra,* 675 F.2d at 1326 n.7a; *Copeland III, supra,* 641 F.2d at 900. Some firms, including plaintiffs' counsel, charge rates that are "reduced to reflect the financial constraints of their clientele," *Laffey, supra,* 572 F.Supp. at 373, and others—the "public interest" bar—charge nothing at all.[2] All agree that employment and civil rights litigation is frequently, if not typically, handled by such firms. *See* Def.Mem. at 3; Plts.Reply at 8. Defendant finds great meaning in this circumstance: "[j]ust as in any other market, if all or most consumers pay a lower cost, that 'reduced rate' is the market rate." Def.Mem. at 3. The Supreme Court, however, reached a different conclusion:

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[2] Named plaintiff Alison Palmer agreed to pay Terris & Sunderland rates of $25 per hour between 1976 and 1979 and $30 per hour from 1980 to present. *See* First Terris Affidavit at ¶ 6. The agreement specifically notes that the rates are "below the ordinary market rate" and the firm agreed to them "only because of the limited financial resources of Ms. Palmer." Ms. Palmer has paid approximately $113,000 to the firm, and apparently continues to pay at the rate of $1,000 per month. *See* Plts. Resp. Interr. Nos. 2, 7; First Terris Affidavit at ¶ 6; Terris Depo. at 22. Terris & Sunderland also received fairly small voluntary contributions from other members of the class. *See* Terris Depo. at 22-24. The agreement also contains detailed provisions regarding distribution of any attorney's fees award or settlement. *See* Terris Depo. at 24-26.

> "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a non-profit legal services organization. The citations to *Stanford Daily* and *Davis* make this explicit. In *Stanford Daily*, the court held that it 'must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of *pro bono publico* than as an effort at securing a large monetary return.' 64 F.R.D. at 681." *Blum, supra*, 104 S.Ct. at 1547 (citations omitted).

The "lower costs" defendant points to are a function of the type of firm charging them. The type of firm after *Blum* is irrelevant. *Blum* thus seems to read much of the relevance out of an attorney's "actual charge," and nothing in *Concerned Veterans* precludes a court from examining the actualities of "actual rates." *Cf.* 675 F.2d at 1326 n.7a. The *Blum* and *Laffey* cases make clear that actual rates do not necessarily reflect "market value," and market value is the touchstone of the fee inquiry.

Market value is properly derived by evaluating the complexity of the litigation, and the "skill, experience, and reputation" of the attorney handling the matter. *Blum, supra*, 104 S.Ct. at 1547 n.11. The focus then shifts to the community:

> "An applicant is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award. For example, affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases provide prevailing community rate infor-

> mation. Recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work are also useful guides in setting an appropriate rate." *Concerned Veterans, supra*, 675 F.2d at 1325.

Plaintiffs make all the showings necessary to justify the proposed rate schedule. There is no question that the case was and is complex. Defendant does not dispute it, and the record reveals it. The case involved across-the-board challenges to a particularly obscure personnel system. The procedural device was a class action. The substantive law was in flux. This case was no ordinary lawsuit.

There is also no question that the attorneys of Terris & Sunderland possess skill and experience in employment matters. Fifteen to twenty percent of the firm's caseload involves Title VII cases. *See* Plts.Resp.Interr. No. 24; First Terris Affidavit at ¶ 1; Attachment B to Dec. 12 App. Resumes of the individual attorneys who participated reveal substantial experience and interest in the area. Finally, the Court's own familiarity with the work-product of the firm confirms these observations. Their work has been superior throughout.

Plaintiffs supply considerable community information against which to compare their request. Affidavits from a number of Washington attorneys establish several points: 1) employment cases are as difficult to prosecute and defend as other types of federal litigation; 2) local lawyers charge the same fees for employment cases as they do in other cases; and 3) the rate schedule proposed by plaintiffs is, as plaintiffs observe, "equal to or below prevailing market rates in the District of Columbia for lawyers of

similar skill and experience." Plts.Mem. at 23.[3] Plaintiffs also describe fee awards in a number of other cases, including this Court's awards in *Laffey* and *Bachman* v. *Miller*, 567 F.Supp. 317 (D.D.C. 1983).[4] All of these materials—unchallenged by defendant—support the Court's conclusion that plaintiffs' proposed rate schedule is consistent with "prevailing community rates" and therefore appropriately used in calculating the lodestar.

One final matter with respect to that calculation remains. Defendant argues that use of current rates, *i.e.* 1984 rates for work done in 1979, represents an implicit claim for interest barred by sovereign immunity. *See* Def.Mem. at 6-8. The government cites numerous cases reciting the familiar rule that absent specific statutory waiver, interest cannot be awarded against the government. The government, however, does *not* cite ¶ 706(k), the statutory basis of plaintiffs' application:

> "(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee

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[3] For Point 1, *see* Affidavit of Richard B. Sobel at ¶¶ 7-13 (Attachment E); Affidavit of Barry L. Goldstein at ¶ 6 (Attachment F); Affidavit of James Robertson at ¶ 6 (Attachment U). For Point 2, *see id.*; Affidavit of Daniel A. Reznick at ¶ 7 (Attachment T). For Point 3, *see id.* at ¶¶ 13-14, 16; Robertson Affidavit at ¶ 8.

[4] In *Laffey*, the Court awarded attorney's fees in the 4-7 and 8-10 year categories at $100 and $125, respectively. 572 F.Supp. at 371, 375. In *Bachman*, the Court awarded attorneys with five years experience $90. 567 F.Supp. at 321. *See also Plannells* v. *Howard University*, 34 FEP Cases 66, 68 (D.D.C. Feb. 17, 1984).

as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

Section 706(k) permits an award of "costs" to the prevailing party. It includes a "reasonable attorney's fee" as "part of the costs." It provides that the United States "shall be liable for costs the *same as a private person.*" "Private persons" are not entitled to sovereign immunity. "Private persons" who lose Title VII suits may be required to compensate the winner at current rates. *See, e.g., Laffey, supra,* 572 F.Supp. at 380-81. Section 706(k) is a statutory waiver of sovereign immunity, and current rates may be employed when calculating a fee award against the government. *See Murray* v. *Weinberger,* No. 83-1680 (D.C. Cir. Aug. 24, 1984); slip op. at 17-19.[6] *See also Copeland III, supra,* 641 F.2d at 893 n.23; *Concerned Veterans, supra,* 675 F.2d at 1329. The sovereign immunity bar on awards of interest simply is not applicable, and use of current rates is appropriate.

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[6] In *Murray* v. *Weinberger,* the Court of Appeals acknowledged but did not address the prejudgment interest/sovereign immunity theory advanced in opposition to a lodestar adjustment based on delay in payment. The Court apparently was not troubled by the argument's implications in the current rates context. Indeed, the Court expressly approved the use of current rates against the government to "counterbalance the delay in payment as well as simplify the task of the district court." *Id.* at 18. *See also Copeland III, supra,* 641 F.2d at 893 n.23; *Concerned Veterans, supra,* 675 F.2d at 1328-29. An "either-or" rule emerges from the cases: the applicant may calculate the lodestar according to current rates, or she may rely on historical rates and seek an adjustment for "delay in payment." The former approach is favored, and is appropriate here.

In sum, the Court finds reasonable a merits lodestar of $281,391, and a fee litigation lodestar of $63,901.25, for a final lodestar of $345,292.25. The next issue is whether an award above that amount is appropriate.

2. *Adjustments to the Lodestar*: *Contingent Nature of Success*

Plaintiffs urge that the merits lodestar be adjusted upward by 24% to compensate for the "contingent nature of the case." Prior to 1984, the theory and practice of the "contingency" or "risk of nonpayment" adjustment was fairly well-established. As the Court of Appeals explained, the adjustment is intended to "compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained," because only prevailing parties are entitled to a statutory fee award. *Copeland III*, *supra*, 641 F.2d at 892. The analysis looks first to the terms of any fee arrangement between plaintiff and counsel, because an adjustment is "appropriate only if counsel would have received no significant remuneration if the suit were not successful." *Concerned Veterans*, *supra*, 675 F.2d at 1328. The inquiry then turns to the "specific circumstances" of the case, *id.*, supporting an adjustment, a test most thoroughly described in this Court's 1983 decision in *Laffey* v. *Northwest Airlines* (*see infra* at 13.).

Recent decisions by the Supreme Court and the Court of Appeals, however, cast doubt on the continuing validity of the contingency adjustment. In *Blum* v. *Stenson*, the Supreme Court held that the lodestar figure "normally provides a 'reasonable' attorney's fee within the meaning of the statute." 104 S.Ct. at 1548 (citing *Hensley* v. *Eckerhart*, *supra*,

103 S.Ct. at 1940). The Court observed that any "upward adjustment to the presumptively reasonable fee of rate times hours is appropriate" only in "the rare case." *Id.* at 1550 n.18. The Court, however, noted that it had "no occasion in this case to consider whether the risk of not being the prevailing party . . . may ever justify an upward fee adjustment." *Id.* at n.17.

The Court of Appeals considered the *Blum* case five months later in *Murray* v. *Weinberger*. In *Murray*, the Court emphasized that *Blum* did not expressly approve the contingency adjustment doctrine, and that, in any event, "an upward adjustment to compensate for the risk of losing . . .is permissible only in an *exceptional case*." Slip op. at 16 (emphasis supplied). The Court described the "minimum requirements that must be met" to obtain the adjustment:

> "The upward adjustment is not proper when: (1) the lodestar itself comprehends an allowance for the contingent nature of fee payment; or (2) the fee applicant bore little or no risk of nonpayment because of a fee arrangement with the client; or (3) the case is not exceptional within the meaning of *Blum* v. *Stenson*." *Id.* at 14.

Plaintiffs' request here for an adjustment must be evaluated under these new standards. The first and second prongs of the *Murray* "minimum requirements" test are considered in the margin.[6] More dif-

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[6] Quite frankly, the Court has some difficulty in understanding the *Murray* Court's explication of the first "minimum requirement": an adjustment is "not proper when (1) the lodestar itself comprehends an allowance for the contingent nature of fee payment." *Id.* at 14. In *Concerned Veterans,*

ficulty comes in applying the third test: a risk of loss adjustment is proper only if the case is "exceptional within the meaning of *Blum* v. *Stenson*." *Id.*

---

the Court observed that the hourly rate could "reflect the possibility that the suit would not succeed and no fee would be obtained," and urged applicants to "present the proposed lodestar billing rate exclusive of any risk premium." 675 F.2d at 328. The "contingent nature of fee payment," of course, is due to the requirement that only prevailing parties are entitled to a fee award. The contingency is the possibility of an adverse ruling by the court. In a setting where the proposed rate already takes that possibility into account, an adjustment is obviously unwarranted.

The *Murray* Court puts a somewhat different spin on the inquiry:

> "All lawsuits have a risk of nonpayment attached to them. As we noted in *Copeland* v. *Marshall*, every attorney faces a risk of not getting paid for some of the work expended on behalf of a client, because, for a variety of reasons, not all hours worked are billed and recouped by an attorney. The hourly rates which attorneys charge reflect the fact that a certain number of hours rendered will not generate any legal fees. The market-based hourly rate which is incorporated into the lodestar figure therefore includes an increment for the normal risk of not being paid for some of the hours that an attorney expends. Thus, an enhancement of the lodestar figure for the risk of nonpayment is not proper if the risk of nonpayment in the particular case is the same as it is in the average case in the relevant market." Slip op. at 14-15 (footnotes omitted).

In *Murray*, "risk" no longer means the possibility of losing the suit. "Risk" essentially means "billing judgment," a matter that seemingly has little to do with the traditional understanding of the contingency doctrine. The *Murray* Court does acknowledge the "possibility of loss" formulation in its third "minimum requirement," but the salient point is that an already "inherently imprecise" determination, *Copeland III*, *supra*, 641 F.2d at 893, now has an added gloss that is some-

at 14. Despite citing a "pressing need for simple rules in attorney's fees cases," *id.* at 18, the Court unfortunately failed to describe any circumstances

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what remote from its theoretical foundation. In addition, the *Murray* Court offers no guidance on how to go about applying its new risk of nonpayment rule. The rule appears to require the district court to examine the billing judgment exercised by the applicant, determine whether it generally matches community practice (*i.e.*, the "average case in the relevant market"), and deny any adjustment if the applicant's "billing judgment increment" is excessive. (Needless to say, an adjustment is improper under the *Copeland III/Concerned Veterans* formulation of the first minimum requirement if the proposed rate includes an allowance for the possibility of loss on the merits.) The Court is already required to examine the applicant's billing judgment in calculating the lodestar, and as noted *supra* note 1, Terris & Sunderland's practice is not extraordinary or unusual in any way. The Court therefore concludes that plaintiffs' application satisfies both traditional and *Murray* standards; the proposed hourly rate does not include an allowance for risk of loss, and it does not include an excessive allowance for "non-billable" work.

With respect to the second minimum requirement, the retainer agreement with Ms. Palmer assured plaintiffs' counsel of some "remuneration." (*see supra* note 2). The percentage adjustment proposed by counsel takes this "partial contingency" into account: "[the contingency portion] was calculated by determining the ratio of the average hourly rate for merits issues paid by plaintiffs ($28.51) and the average hourly rate for merits issues requested in this application ($102.45) . . . This ratio (0.72) represents the percentage of the case which was contingent. This percentage was then multiplied by 33%. The resulting 24% rate is the effective contingency rate for all plaintiffs' work on merits issues for the applicant class." Plts. Mem. at 31-40. (Derivation of the 33% percentage is explained *id.* at 37-39. *See also* Plts. Reply at 22). This approach adequately captures the degree to which the risk of nonpayment was reduced by the fee arrangement.

th it may be deemed to be "exceptional within the m aning of *Blum*." This omission is particularly tr ublesome, because, as noted, *Blum* itself did not in olve an express request for a risk of loss adjustm nt. Moreover, *Blum* did not define "exceptional." Tl e Court included the degree of success achieved as one mark of the exceptional, but did not limit the relevant factors solely to the "results obtained." 104 S.Ct. at 1550 (citing *Hensley, supra*, 103 S.Ct. at 1940). The *Murray* Court does suggest that an "exceptional" case is "one of those rare cases in which [an adjustment] is necessary to facilitate the filing of meritorious claims," but does not describe the sort of setting where the desired behavorial incentives may be found. In short, the simplicity of these standards is difficult to discern.

Perhaps the best course is to review current contingency law against the backdrop of the *Blum* opinion, and determine whether *Blum* rules out reliance on any previously relevant factor. In *Laffey*, Chief Judge Robinson outlined the test:

> "In order to assess the risk that Plaintiffs' counsel accepted at the outset of this litigation, the Court must consider not only the probability of success but what was being risked. The former category requires an evaluation of (1) the legal and factual complexity of the case; (2) the probability of defendant's liability, including whether it has been suggested by previous proceedings and whether it is asserted under existing case law or is advanced as a novel theory; and (3) the difficulty or ease with which damages (if any) could be proven. The latter category includes the number of hours and the amount of out-of-pocket expenses risked without

guarantee of compensation." 572 F.Supp. at 378 (citation and footnote omitted).

The *Laffey* approach defines "risk at the outset" as a function of the merits and the mechanics of the litigation, with the complexity of the case obviously affecting both elements. In *Blum*, however, the Supreme Court found that "neither complexity nor novelty of the issues . . . is an appropriate factor in determining whether to increase the basic fee," because those factors "presumably were fully reflected in the number of billable hours recorded by counsel." 104 S.Ct. at 1548-49.

A close reading of *Blum* suggests that *Laffey's* contingency analysis, incorporating consideration of complexity and unsettled law, remains good law. First, the Supreme Court only ruled out complexity in and of itself as a basis for an upward adjustment. *See id.* at 1548. The Court did not reach the general question of contingency adjustments, much less the narrower matter of calculating one. Second, the Court emphasized the thin record before it. The applicant in *Blum* apparently made no novelty or complexity argument. There was nothing in the affidavits or briefs "identify[ing] any risks associated with the litigation." *"On this record,"* the Court concluded, "any upward adjustment for the contingent nature of the litigation was unjustified." *Id.* at 1550 (emphasis supplied). The Court did not foreshadow the result in a case like this one, with a carefully assembled and documented request.

Third and more generally, the *Laffey* approach is consistent with at least one broader theme of the *Blum* opinion: equal treatment of private and public-interest attorneys. A complex or novel matter obviously requires more work. As the *Blum* Court

ma le clear, the realities of document searches and sop iisticated legal analysis are fully addressed by the lodestar formula: hours billed multiplied by a rate reflecting the demands upon, and the abilities of, the prevailing party's attorney.

As the Court noted, however, "the product of reasonable hours times a reasonable rate does not end the inquiry." *Id.* at 1548 n.14 (quoting *Hensley*, *supra*, 103 S.Ct. at 1940). Complexity and novelty present problems going beyond late nights at the office. Unsettled law "magnifies the risk" of an unsuccessful suit because it increases the likelihood of appeal and changes in controlling law. Complicated and wide-ranging claims raise the possibility of a smoking gun in the files pointing directly at plaintiff, and the certainty of counsel's "substantial investment (both in time and out-of-pocket expenditures) over an extended period." *Laffey*, *supra*, 572 F.Supp. at 378-79 & n.48. It bears repeating that risk is assessed at the outset, where both controlling law and conclusive fact are but subjects of prediction.

It also bears note that while private attorneys are compensated whether their predictions are accurate or not, public-interest or reduced-rate lawyers have no such security. The value to the private attorney of her fees comes only from the dollar amount but also the near certainty of payment (barring the client's bankruptcy or similar financial disaster). The "risk premium" of *Concerned Veterans* simply serves as a proxy for the security element inherent in the private attorney's fee. In a legal regime where distinctions between private and public-interest firms are irrelevant, *see Blum*, *supra*, 104 S.Ct. at 1547, and where the objective is to fashion a fee award closely modeled on "prevailing market standards," then the award must reflect both the effort of the

attorney and the certainty or uncertainty of ever receiving compensation for it. That is the purpose of the contingency adjustment, and the Court believes that the *Laffey* method of achieving it remains valid after *Blum*.

Plaintiffs adequately identify the "specific circumstances" supporting an adjustment in this case. *See* Plts.Mem. at 31-35. Both legal and factual complexity and uncertainty existed at the commencement of this suit. For example, on the critical issue of employment test validation, there was no legally preferred method of validation (*see Washington v. Davis*, 426 U.S. 229, 247 n.13 (1976)), and plaintiffs had no knowledge of whether defendant in fact employed validation procedures. That remained to be uncovered through discovery. Furthermore, plaintiffs' counsel were obviously committing significant time and resources, particularly in view of the firm's small size. Class actions involve efforts beyond those associated with an ordinary lawsuit, and the massive statistical evidence required expert (and expensive) analysis. *See* First Terris Affidavit at ¶¶ 29, 38. It appears to the Court that a contingency adjustment is "necessary to facilitate the filing" of cases of this type, where both the scope of the claims and the number of complainants are atypical.

At the same time, however, plaintiffs' lead counsel believed that the class had a strong case; he put the odds of success at 75%. *See id.* at ¶ 54; Terris Depo. at 41. The Court shares that belief, perhaps even more strongly. Upon consideration, the Court believes that the merits lodestar should be adjusted upward by 20% to fairly compensate plaintiffs' counsel for its efforts in taking on and successfully completing this portion of the litigation. The adjustment produces a final merits award of $337,669.20.

Litigation Expenses

The final issue concerns defendant's objection to $2 528.97 of the $35,880.99 sought by plaintiffs as reimbursement for "reasonable litigation expenses." Defendant claims that expenditures on postage, long distance telephone calls, photocopying, and others are part of overhead and thus not compensable. *See* Def. Mem. at 9. The test for compensability turns on whether the claimed expenses are routinely billed to clients, reasonable in amount, and adequately documented. *See Laffey, supra,* 572 F.Supp. at 382-83; *Plannells* v. *Howard University, supra,* 34 FEP Cases at 71. Plaintiffs' supporting materials and discovery taken by defendant demonstrate that the challenged expenses were and are customarily billed to clients, and given the scale of this action, were reasonable in amount. Consequently, the expenses claimed by plaintiffs should be awarded in full, for a total of $37,971.03.

4. *Conclusion*

Courts do not like attorney's fee litigation, and at every opportunity encourage parties to reach settlement. *See, e.g., Blum, supra,* 104 S.Ct. at 1550 n.19; *Concerned Veterans, supra,* 675 F.2d at 1330-31. The Court of Appeals in *Copeland III* and in *Concerned Veterans* set out specific substantive and procedural standards in part to encourage settlement of fee requests. In particular, the *Concerned Veterans* case requires the government defendant to assemble a "precise," "limited," "well-founded" challenge to the request, supported by "equally specific countervailing evidence." *Id.* at 1338 (Tamm, J., concurring), 1326. Blunderbusses do not carry burdens.

In this case plaintiffs filed a comprehensive, reasonable and thoroughly documented fee request. Plaintiffs attached all the required baggage. There are affidavits, resumes, and time slips. It was an eminently professional effort, fully in accord with the letter and spirit of *Copeland III* and *Concerned Veterans*.

The government, on the other hand, submitted a nine-page memorandum of law that practically ignores the law, and three lists apparently offered as "equally specific countervailing evidence." This Court has its doubts about the fee calculation standards that have evolved, but it has no doubt that all involved must play by the rules set down by the Supreme Court and the Court of Appeals. Should the government decide that the costs of playing by the rules exceed the difference in settlement positions, it should settle, rather than submit a sadly deficient (but inexpensive) "opposition" to the Court. The government should always remember that judges as well as fee awards are paid from the public treasury.

In sum, the Court concludes that plaintiffs' proposed lodestar figure, adjusted upward by 20%, represents a fully-compensatory fee. The Court is not penalizing defendant for less-than-artful advocacy; the award is based on review of the record and on a reasonable, documented application.

Accordingly, plaintiffs' request for an award of attorney's fees and expenses under 42 U.S.C. 2000e-5(k) is granted in the amount of $439,541.48.

An appropriate order follows.

/s/ John Lewis Smith, Jr.
United States District Judge

Dated: September 14, 1984

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20272

(2)

Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-86

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

MARGUERITE COOPER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 86-86

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

MARGUERITE COOPER, 1/ ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Respondents, on behalf of a class of female Foreign Service Officers ("FSOs") and female applicants to become FSOs,

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1/ The case was originally captioned "Marguerite Cooper King, et al. v. United States, et al." in the district court. Subsequently, Ms. King notified the district court that she had legally changed her name to Marguerite Cooper, and the caption was modified.

brought this action in 1976 alleging that the Department of State discriminated against women both in their opportunities for hire as FSOs and in their employment opportunities after hire, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. All claims relating to the initial hiring of female FSOs at the entry level were resolved on October 12, 1983, when the District Court for the District of Columbia approved a consent decree which provided, inter alia, that petitioner would appoint 75 class members as FSOs during the calendar years 1984 through 1987. The district court found that the settlement "eliminat[ed] seven previous years of hiring disparities, and carr[ied] a conservatively estimated monetary value of $8.6 million."

Pet. App. 12a.[2] The Consent Decree further provided that its entry by the court constituted a final action on the entry-level hiring portion of the case and entitled respondents to move the court for attorneys' fees and costs.

In December 1983, respondents applied for $416,736.03 in fees and expenses.[3] This request included hourly rates ranging from $75 to $150 per hour, depending on the level of experience of

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[2] "Pet. App." refers to the Appendices to the government's Petition for a Writ of Certiorari. "Pet." refers to the government's brief in support of its Petition.

[3] Respondents supplemented this request in July 1984 and again in December 1984, seeking an additional $52,966.81 in fees and expenses, thereby bringing respondents' total request to $469,702.84.

the individual attorney, and a 24% contingency adjustment. Respondents did not at that time seek an upward adjustment for the quality of representation on the ground that "[t]he quality of an attorney's work in general is a component of the reasonable hourly rate." Pl. App. for an Award of Attorneys' Fees and Expenses, p. 29 (December 12, 1983). Petitioner did not oppose either respondents' entitlement to an award of attorneys' fees and expenses as a prevailing party or the reasonableness of the hours spent by respondents' counsel. It challenged only the hourly rates at which compensation was sought, the contingency multiplier, and certain expenses.

On September 17, 1984, the district court awarded attorneys' fees and

expenses for all hours claimed at the hourly rates sought by respondents but allowed only a 20% upward adjustment for contingency rather than the 24% requested. The district court found that respondents' proposed rate schedule, ranging from $75 to $150 an hour depending upon the individual attorney's years of experience, was consistent with prevailing market rates for the Washington, D.C. community and accurately reflected both the complexity of the litigation and the "skill, experience and reputation" of counsel. Pet. App. 29a-34a.

Thereafter, the attorneys' fees litigation in these consolidated cases followed a tortuous path. Just 11 days after the district court's September 17, 1984, opinion, the Court of Appeals for

the District of Columbia Circuit decided Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (1984), certiorari denied, 105 S.Ct. 3488 (1985), which held that an attorney's actual billing rate is presumptively the market rate for his services. Petitioner moved for a stay of the district court's order awarding fees and moved for reconsideration in light of Laffey, supra. Due to the lengthy delay which would be necessitated by the district court's consideration of the new court of appeals' decision and any subsequent appeals, respondents moved the district court for an interim award of the uncontested portion of their fees and expenses. As a result, the district court made an award of $219,439.40, which represented the uncontested number of hours multiplied by counsel for

respondents' actual historic billing rates, plus expenses. Pet. App. 22a. In addition, in a separate interim order, the district court awarded respondents $38,222.81, which represented the difference between counsel's current and historic billing rates for these same hours. Pet. App. 20a.

Petitioner appealed both of the district court's interim orders. Petitioner presented no legal arguments in support of its appeal of the uncontested amount. Both orders were summarily affirmed by the Court of Appeals for the District of Columbia Circuit. Pet. App. 18a. Petitioner thereafter paid the uncontested amount and petitioned for a writ of certiorari as to the use of current rates. This Court granted the petition and vacated the judgment of the

court of appeals as to the use of current rates as compensation for delay in light of its decision in Library of Congress v. Shaw, 54 U.S.L.W. 4951 (July 1, 1986).

While the uncontested and current rates issues were on appeal, the district court issued its decision on petitioner's motion for reconsideration in light of Laffey, supra. Pet. App. 7a. Respondents argued that Laffey did not require the use of counsel's actual billing rates in this case, but that, if the court found to the contrary, it should adjust the lodestar upward by 55% to reflect the quality of counsel's representation. The district court found that counsel's actual current rates should be used to calculate the lodestar, but adjusted the lodestar upward by 54.75% in order to reflect its finding that counsel's

"services were equal in quality to those of attorneys charging that [higher] rate" and "far superior to what could be reasonably expected of attorneys charging a maximum of $65 per hour for associates and $80 per hour for partners." Pet. App. 12a.

The district court's total award after reconsideration, therefore, did not differ significantly from its original award. Since Laffey did not address the issue of the use of current versus historic rates, the district court did not reconsider its decision upholding the use of current rates. It used the law firm's current actual billing rates to arrive at the lodestar, then separately multiplied the merits lodestar by the 54.75% adjustment for quality and the 20%

contingency adjustment. No enhancements were made of the lodestar for the time spent litigating the attorneys' fee application itself.

Petitioner appealed and respondents cross-appealed the district court's modified award. In a brief unpublished opinion, the court of appeals (Judges Ginsburg, Scalia and Buckley) suggested that its own interpretation of Laffey might have led it to conclude that the use of counsel's actual billing rates was not appropriate in this case as "the firm's own rate may have fallen below the rate brackets indicated by the charges of other firms for similar work in this community." Pet. App. 2a. However, in light of the "reasonable result achieved" and the "large respect we owe to district court assessments in these

matters," the court declined to disturb the award. Ibid.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

Respondents submit that the petition should be denied for the following reasons:

First, the litigation over this 1984 district court award of attorneys' fees and expenses has already been protracted. The government's petition for a writ of certiorari raises no questions of substantial importance. In fact, the government's petition does not even seek plenary review by this Court but merely asks the Court for summary reversal and a remand in light of other recent, and in the case of the contingency adjustment, pending decisions by this Court. This strategy will only serve to further pro-

long this litigation and, therefore, respondents submit that this Court should deny the government's petition.

Second, the government seeks a remand of the upward adjustment for quality awarded by the district court in light of this Court's recent decision in Delaware Valley. That case does not represent any change in the law since this court's earlier decision in Blum v. Stenson upon which the district court relied. Moreover, the award in this case, namely -- a lodestar based on counsel's normal hourly rates which the district court found to be far below prevailing market rates coupled with a quality adjustment intended to compensate counsel at market rates does not result in double counting and therefore is not affected by Delaware Valley.

Third, the government seeks a remand of the upward adjustment for contingency in light of this court's impending decision based on reargument in Delaware Valley. The district court correctly found, pursuant to this court's decision in Blum v. Stenson, that this was an exceptional case which justified an upward adjustment for contingency. The district court's findings should therefore only be disturbed if there was an abuse of discretion. The government's petition does not claim such an abuse. Here, the government seeks certiorari based only on the possibility of a future change in the law, which may or may affect the factual findings of the district court in this case.

Finally, the government seeks review of the fact that the lodestar, by

which the two upward adjustments in this case were multipled, was calculated based on counsel's current billing rates as a form of compensation for delay. Petitioner failed to present this issue to the court of appeals and the court, therefore, did not address it. As this court has frequently held, issues neither raised before nor considered by the court of appeals should not be addressed by this Court.

ARGUMENT

I. THE GOVERNMENT'S PETITION RAISES NO IMPORTANT ISSUES WARRANTING REVIEW BY THIS COURT

The courts have repeatedly warned against making attorneys' fee litigation as complex and difficult as the litigation on the merits. As this Court stated in Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), and reiterated in Blum v.

Stenson, 465 U.S. 886, 902, n. 19 (1984) a "request for attorney's fees should not result in a second major litigation." See also National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1324 (D.C. Cir. 1982); Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980) (Copeland III); Lindy Bros. Builders, Inc. v. American Radiator Standard Sanitary Corp., 540 F.2d 102, 116 (3rd Cir. 1976) (Lindy II"). As the Third Circuit stated in Lindy II, supra (540 F.2d at 116):

> [W]e did not and do not intend that a district court, in setting an attorneys' fee, become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief.

The courts have also repeatedly emphasized that, in reviewing attorneys' fee awards, appellate courts should not reverse unless the district court has committed a clear abuse of discretion. As this Court stated in Hensley, supra, 461 U.S. at 437:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

See also Blum v. Stenson, supra, 465 U.S. at 886; Copeland v. Marshall, supra, 641 F.2d at 901; Lindy II, supra, 540 F.2d at 116; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166 (3rd Cir. 1973) ("Lindy I").

The broad discretion of the district

courts in making attorneys' fee awards is based on two considerations. First, the district court has far more familiarity with both the case and the activities and skill of counsel in the case. Hensley, supra, 461 U.S. at 437; Blum, supra, 465 U.S. at 886. Second, if the appellate courts substitute their judgment for that of the district courts, the losing parties will be encouraged to appeal all awards in the hope that the appellate court will come to a different result on at least some part of the district court's decision. The result will be to protract further attorneys' fee litigation and to burden further the caseloads of the appellate courts contrary to the frequently stated desires of the courts.

We submit that this Court should not encourage the government to prolong the

"second major litigation" it has already created in this case by granting this petition for certiorari. There are no special and important reasons for granting a writ of certiorari from the decision of the court of appeals. R. of S.Ct. 17. It raises no important, novel or recurring questions, nor does it present a conflict among the federal courts of appeals. Instead, this case basically involves whether there has been an abuse of discretion by the district court on what are essentially factual matters.

The court of appeals stated that the issues presented "occasion no need for an opinion by this court." Pet. App. la. Consequently, the court issued a one-paragraph memorandum in support of its affirmance of the district court's

decision awarding attorneys' fees and expenses to respondents. According to the Rules of the Court of Appeals for the District of Columbia Circuit, this unpublished memorandum may not be cited in briefs or memoranda of counsel as precedent, except for such purposes as application of the doctrines of res judicata, collateral estoppel and law of the case. D.C. Cir. R. 8(f). Therefore, the government is in effect asking this Court to review a district court decision which the court of appeals did not even deem of enough general importance to warrant a published opinion.

Moreover, the government is not asking this Court to decide any of the issues it has presented, but merely to remand the case to the lower courts for further consideration. It is not un-

likely that, after such reconsideration, the losing party will seek review in this Court.[4/] The opportunity for continued delay in the final resolution of the attorneys' fees at issue here is obvious. As stated by this Court in Magnum Co. v. Coty, 262 U.S. 159, 163 (1923):

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

The district court, which had extensive first-hand knowledge of this case and of the work of respondents' counsel over seven years of litigation, carefully

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4/ For this reason, respondents request that, in the event this Court agrees to grant a writ of certiorari, it should grant plenary review rather than simply remand the case to the court of appeals for further consideration. See Respondents' Cross-Petition for a Writ of Certiorari, pp. 17-21.

set forth its reasoning for each aspect of its award. The court of appeals found (Pet. App. 2a):

> In view of the large respect we owe to district court assessments in these matters, and the reasonable result achieved, we can find no abuse of discretion in the fees and expenses awarded in the order on review.

Respondents submit that this Court should similarly give substantial weight to the well-exercised discretion of the district court and finally resolve this portion of the litigation by denying the government's petition for a writ of certiorari.

II. THIS COURT'S DECISION IN PENNSYLVANIA v. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR DID NOT CHANGE THE LAW WITH RESPECT TO AN UPWARD ADJUSTMENT FOR QUALITY AND DOES NOT JUSTIFY A REMAND

Petitioner contends (Pet. 8) that a writ of certiorari should be granted and

a remand ordered concerning the upward adjustment made by the district court for quality of representation because of this court's recent decision in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 54 U.S.L.W. 5017 (July 2, 1986). We submit that Delaware Valley did not change significantly, if at all, the prior law on this issue and a remand is not warranted. Both Blum v. Stenson, supra, and Delaware Valley, 54 U.S.L.W. at 5022, hold that "considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate * * *" used to calculate the lodestar. Indeed, the government's petition for a writ of certiorari quotes Delaware Valley, which, in turn, is quoting Blum. Pet. 7. On this issue, therefore, there

has been no change in the law since Blum was decided in 1984.

Moreover, Blum was decided prior to the district court's consideration of respondents' fee request and was correctly applied by that court. This Court held in Blum that (465 U.S. at 896, n. 11):

> [T]he burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to--for convenience--as the prevailing market rate.

In its original opinion, the district court found that "[s]ome firms, including plaintiffs' counsel, charge rates that are 'reduced to reflect the financial constraints of their

clientele,' * * * and others--the 'public interest' bar-- charge nothing at all" (citation omitted). Pet. App. 31a. Citing Blum, the district court concluded that "actual rates do not necessarily reflect 'market value,' and market value is the touchstone of the fee inquiry." Id. at 32a.

In its subsequent opinion on reconsideration in light of Laffey, the district court felt constrained by the holding of that case to apply the firm's actual rates in its calculation of the lodestar. Pet. App. 11a.[5/] It held,

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5/ Respondents believe that the district court erred insofar as it held that Laffey required it automatically to apply the rates charged by respondents' counsel rather than market rates despite the fact that the evidence showed that the rates charged by respondents' counsel were far below prevailing market rates. This issue is dealt with in respondents' cross-petition for a writ of certiorari, at pages 11-17.

however, that those rates did not adequately reflect the quality of counsel's representation and the excellent results obtained. Id. at 12a. Moreover, it noted that, pursuant to its original opinion, it viewed counsel's services as of the caliber of firms charging prevailing market rates in the Washington, D.C. legal community for similarly complex federal litigation. The court's decision was based on considerable evidence in the record as to prevailing market rates, as well as its first-hand knowledge of the case and of counsel's work throughout the seven-year duration of the litigation. See Pet. App. 12a, 33a-34a. These findings should not be disturbed unless they are clearly erroneous.

In Blum, this Court held that "[t]he

'quality of representation[]' * * * generally is reflected in the reasonable hourly rate" which in that case was found to be $95 to $105 per hour for attorneys who had 1 1/2 years of experience or less as practicing attorneys. It therefore held that it was improper for the district court to award an additional 50% upward adjustment for the quality of representation, which would have been a clear example of double-counting.

Here, in contrast, the district court clearly did not engage in double-counting. Having previously determined that the work of respondents' counsel was superior and justified an award at prevailing Washington, D.C. rates (Pet. App. 33a), but believing itself constrained to award respondents' counsel a lodestar

amount based on substantially lower hourly rates, the court found that an upward adjustment equal to the difference between these two sets of rates was justified. The district court's use of an upward adjustment for quality was, therefore, simply a means of compensating for the fact that the lodestar amount did not reflect "the reasonable hourly rate" for respondents' counsel's services.

Delaware Valley is likewise inapposite. In that case this Court noted that, although the lower court had found the quality of representation to be superior, this finding was contradicted by the court's finding that only 324 out of 620 hours should be compensated. 54 U.S.L.W. at 5022. In contrast, in this case, the government conceded the reasonableness of the hours expended. In addition, the

district court independently reviewed the hours and found all hours claimed to be justified (Pet. App. 28a, n. 1):

> Plaintiffs claim a total of 2746.63 hours devoted to merits issues, and 642.25 hours to the fee litigation. The application carefully distinguishes between time devoted to the 'employee' and to the 'applicant' portions of the case, and offers a reasonable method for compensating efforts common to both claims. Furthermore, counsel's 'billing judgment,' as articulated and as applied, cannot be criticized. Counsel exercised it in a conscientious and fair manner throughout. [citations omitted]

In Delaware Valley, this Court also considered the fact that the lower court found that a substantial number of hours were performed by a more experienced attorney but "could have been done by an attorney working at the associate level" and other work "required little or no legal ability." 54 U.S.L.W. at 5022.

In contrast, in this case, the district court found that "[b]ecause of the firm's policy of assigning primary responsibility at any given time to one or two associates, attorneys in the 4-7 and 8-10 year categories ($95-110) [per hour] performed most of the work." Pet. App. 29a.

Furthermore, the opinions of the courts below in this case are fully consistent with the only other court of appeals' decision since Blum on this issue. Garrity v. Sununu, 752 F.2d 727, 739-740 (1st Cir. 1984), is remarkably similar to the case at bar. In that case, the district court had awarded lodestar hourly rates of $60 per hour and $45 per hour based on counsels' normal billing rates and then adjusted the lodestar upward to reflect the quality of the

representation and the exceptional results. Id. at 739. While suggesting, as did the court of appeals in this case, that "certain of the qualities sought to be recognized by the bonuses might better have been recognized by means of more adequate hourly rates," the First Circuit affirmed the lower court's award due to the fact that there was no double counting, there were exceptional results and both counsel's request and the district court's decision were well documented. Id. at 740.

Similarly, in this case, there was no double counting. The district court's award of an upward adjustment does no more than bring counsel's rates up to the level of prevailing market rates. Moreover, the district court found the results to be exceptional and pointed out

that the settlement "eliminat[ed] seven previous years of hiring disparities, and carr[ied] a conservatively estimated monetary value of $8.6 million." Pet. App. 12a. Respondents' request for fees was also well-documented (Pet. App. 45a):

> In this case plaintiffs filed a comprehensive, reasonable and thoroughly documented fee request. Plaintiffs attached all the required baggage. There are affidavits, resumes, and time slips. It was an eminently professional effort, fully in accord with the letter and spirit of Copeland III [Copeland v. Marshall, supra] and Concerned Veterans [National Association of Concerned Veterans v. Secretary of Defense, supra].

In short, the district court faithfully followed the law on quality adjustments as promulgated by this Court. It made all the relevant findings based on a careful review of the evidence. Its proper exercise of discretion should not

be disturbed.

III. THIS COURT SHOULD DENY CERTIORARI ON THE ISSUE OF THE CONTINGENCY ADJUSTMENT

Petitioner asserts (Pet. 8) that this case should either be held in this Court or remanded to the court of appeals and held there until the issue of contingency adjustments in Delaware Valley has been decided by this Court in the coming Term.[6/] 54 U.S.L.W. at 5023.

6/ Respondents submit that, due to the interrelationship of the issues in this case, it is undesirable that a portion of this litigation be retained by this Court while other issues are summarily remanded, as requested by petitioner. Fragmentation of this case, while proposed as a means of expediting consideration of those issues that appeared to be relatively simple, has resulted in the division of the attorneys' fee litigation in this case into several smaller cases that have proceeded independently through the court system. Respondents urge the Court not to fragment this portion of the case even further.

Respondents submit that this issue does not justify further delay in the resolution of the attorneys' fee issues in this case.

This Court, of course, does not sit to correct all errors which might be contained in lower court decisions, but only to decide important questions of law. See, e.g., Stern & Gressman, Supreme Court Practice, p. 258 (5th ed. 1978). Here, the important issues as to contingency adjustments will be decided in another case. The amount involved in this case ($36,364.03) is plainly not enough to make this case of intrinsic importance separate from any legal issues involved.[7/] Consequently, regardless how

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7/ While this sum is insignificant in the context of the United States Government's budget, it is by no means insignificant

the issues regarding contingency adjustments are resolved in Delaware Valley, there is no reason for granting the petition for a writ of certiorari here because of the contingency adjustment.

Moreover, the district court issued a careful, well-reasoned opinion justifying the 20% upward adjustment for

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to respondents' counsel and we strenuously object to the government's assertion that "withholding a final disposition here pending the outcome in Delaware Valley would not delay payment in an inequitable manner." Pet. 8, n. 6. The inequity is even clearer now in light of this Court's decision in Library of Congress v. Shaw, supra, that sovereign immunity bars a claim for post-judgment interest on the sums at issue in this case. The district court's initial award was made almost two years ago. Even assuming a modest simple interest rate of 8%, the delay has already cost respondents and their counsel almost $25,000 in lost earning power. Further delay of the entire case for the purely speculative purpose of awaiting reargument in Delaware Valley of an issue which is contained in only a part of the present case is obviously inequitable.

contingency in this case. Pet. App. 36a-43a. This analysis was undertaken subsequent to this Court's decision in Blum, which made clear that such adjustments were only appropriate in exceptional cases. The district court's findings that such exceptional circumstances existed in this case should, therefore, only be disturbed if there was an abuse of discretion.

The court stated several cogent reasons why a 20% upward adjustment for contingency was appropriate. First, as the court noted, there was both legal and factual uncertainty "on the critical issue of employment test validation." Pet. App. 43a. Second, Title VII "[c]lass actions involve efforts beyond those associated with an ordinary lawsuit," including the need for massive and

expensive expert statistical evidence. Ibid. At the time the Consent Decree was entered, there were in excess of 30,000 members of the class. Therefore, the district court concluded that "a contingency adjustment is 'necessary to facilitate the filing' of cases of this type, where both the scope of the claims and the number of complainants are atypical." Ibid. (quoting Murray v. Weinberger, 741 F.2d 1423, 1432 (D.C. Cir. 1984)).

Respondents submit that there is no justification for a writ of certiorari to be granted simply because of the possibility of a future change in law, which may or may not affect the facts of this case. The government's petition offers no authority for holding a case open in anticipation of a decision which has not even been rendered.

IV. THIS COURT SHOULD DECLINE TO ADDRESS AN ISSUE NOT RAISED BEFORE OR ADDRESSED BY THE COURT OF APPEALS

Petitioner also requests (Pet. 6-7) that a writ of certiorari be granted because the lodestar by which the two upward adjustments were multiplied was calculated based on counsel for respondents' current billing rates at the time of its application for an award of attorneys' fees in December 1983 rather than the appropriate historic rates throughout the pendency of the litigation on the merits from 1976 through October 1983.

In its brief in the court of appeals, petitioner stated the issues it sought to present to that court as follows (Gov. C.A. Br., unnumbered page entitled "Issues Presented"):

> Whether the District Court erroneously awarded a 54.75% enhancement of the attorneys' fees lode-

> star for "quality of representation" concerning the settled portion of the merits of the case, and a 20% upward adjustment for "contingency," characterizing this case as "exceptional" under Blum v. Stenson, 104 S. Ct. 1541 (1984), on both counts.

Petitioner neither raised, nor substantively addressed in its brief the issue whether current billing rates were appropriately used to arrive at the merits lodestar to which the multipliers were added. On the contrary, petitioner specifically stated that "the District Court's use of current rates to calculate the attorneys' fees lodestar is not an issue in this appeal," apparently because the law concerning that issue in the District of Columbia was settled. Gov. C.A. Br. 5, n. 1. Petitioner attempted, by way of a footnote in its Reply Brief in the court of appeals, to preserve the issue by simply asserting that it did not

waive the issue. Gov. C.A. Rep. Br. 10, n. 5. As a result, the court of appeals did not even mention this issue in its opinion.

As this Court has held, issues neither raised before, nor considered by, the court of appeals are not properly before this Court. EEOC v. Federal Labor Relations Authority, 54 U.S.L.W. 4408, 4409 (April 29, 1986); Rogers v. Lodge, 458 U.S. 613, 628, n. 10 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2 (1970); Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); Huty v. United States, 282 U.S. 694, 701-702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927).

In circumstances similar to those here, the petitioner in Adickes v. S.H. Kress & Co., supra, sought to amend his

complaint in district court to include a claim for liquidated damages under Sections 1 and 2 of the Civil Rights Act of 1875. The record showed that the petitioner had never raised the issue before the court of appeals, apparently because of the existence of settled law on point. 398 U.S. at 147, n. 2. This Court declined to address the issue on the grounds that it had not been raised before or addressed by the court of appeals. Ibid.

CONCLUSION

None of the Court's reasons for granting a writ of certiorari are present in this case. There exists no conflict among the circuits. There are no questions of substantial importance under the Constitution, statutes or treaties of the United States. There is not even a re-

ported decision of the court of appeals which could serve as precedent in other, future cases. In these circumstances, the government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 22, 1986

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